

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 03/18/10

DEPT. 37

HONORABLE JOANNE O'DONNELL

JUDGE

S. BARRETT/H.A. SMITH DEPUTY CLERK

HONORABLE  
6.

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

N. AVALOS, C.A.

Deputy Sheriff

C. KWON-CHANG

Reporter

9:00 am

BC414602

Plaintiff

Solomon E. Gresen ✓

Counsel

India S. Thompson ✓

OMAR RODRIGUEZ ET AL

RHEUBAN & GRESSEN

VS

Defendant

Linda Miller Savitt ✓

BURBANK POLICE DEPARTMENT ET AL

Counsel

Christine T. Hoefner ✓

170.6 DAVID P. YAFFE

BALLARD ROSENBERG, ET AL

R/F 7-27-09 Denied as to BC4179

Lawrence A. Michaels ✓

MITCHELL SILBERBERG ET AL

## NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT CITY OF BURBANK FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES AGAINST PLAINTIFF JAMAL CHILDS;

MOTION OF ABOVE DEFENDANT FOR SEPARATE TRIALS;

Matter is called for hearing. Counsel have reviewed the court's written tentative rulings as to both motions. The court hears argument of counsel. The tentative rulings issue as the order of the court as follows:

Motion of Defendant City of Burbank for Summary Judgment/Summary Adjudication of Issues

Defendant's Request for Judicial Notice is granted.

Plaintiff's evidentiary objections to defendant's evidence are overruled in their entirety. Plaintiff objects to the facts stated in defendant's separate statement, not to the evidence supporting those facts. Accordingly, the objections do not comply with CRC 3.1354 and are overruled. Any evidentiary objections that plaintiff sets forth in the separate statement are also overruled as noncompliant with Rule 3.1354.

Defendant's evidentiary objections (1-179) are sustained with the exception of objections Nos. 8, 47 and 130, which are overruled. With few exceptions,

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if any, the witness statements (declarations and deposition testimony) offered by plaintiff in opposition to defendant's motion lack foundation in that the witness fails to identify both the speaker and even a general time frame in which the alleged statement was allegedly made, so it is impossible to determine whether plaintiff Childs was even an employee of defendant when the alleged statement was made. Such foundationless statements, however numerous and inflammatory, cannot be received in evidence.

The motion for summary judgment is granted.

The motion is granted, in part, for the procedural reason that plaintiff's separate statements fails to comply with CCP §437c(b)(3) and CRC 3.1350(f) and/or (h). Where plaintiff asserts that a material fact contended by defendant to be undisputed is disputed, he fails to state the nature of the dispute and to describe the evidence that supports his claim that the fact is disputed, supported by citation to exhibit, title, page, and line numbers in the evidence submitted. The court is thus unable to identify the dispute plaintiff asserts the existence of. The court has discretion to grant the motion on this ground alone. CCP §437c(b)(3). While plaintiff's failure to submit a proper Separate Statement is arguably a curable procedural defect, the court's rulings on defendant's evidentiary objections preclude plaintiff from presenting

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## NATURE OF PROCEEDINGS:

sufficient admissible evidence to raise a triable issue of material fact as to any issue as to which defendant seeks summary adjudication.

Plaintiff's memorandum of points and authorities exceeds the page limitations set forth at CRC 3.1113(d) (opposing memorandum to motion for summary judgment/adjudication is limited to 20 pages); plaintiff did not seek relief from this page limitation. The court has considered the memorandum notwithstanding this rule violation, but has not considered any arguments asserted after page 21 (the 20th page).

First cause of action -- discrimination. To prevail on a discrimination claim, a plaintiff must prove that he was (1) in a protected class, (2) performing satisfactorily in his job, (3) he suffered an adverse employment action, and (4) the action occurred under circumstances suggesting a discriminatory motive. *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355; Gov. Code, § 12940 subd. (a). Defendant meets its initial burden of showing that plaintiff cannot establish a prima facie case of discrimination because plaintiff cannot show an adverse employment action and circumstances suggesting discrimination. (UF 1-47.) Plaintiff admits that he suffered no adverse employment action in that he admits that he deserved the sole reprimand that he received. Plaintiff presents no admissible evidence suggesting that a

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discriminatory motive based on any protected category caused his reprimand. Further, the evidence shows that the complained-of conduct ("check-ups" by another officer) also occurred to non-African-American officers and does not suggest discrimination. Because defendant's evidentiary objections are sustained, plaintiff is unable to raise a triable issue of material fact as to whether he suffered an adverse employment action or whether there are circumstances suggesting discrimination.

Plaintiff's attempts to assert a new, unpled, theory of liability, namely, that plaintiff suffered discrimination based on disparate impact, fails to create a triable issue. A party opposing summary judgment may not advance an unpleaded legal theory to defeat the motion. Weil & Brown, Civil Procedure Before Trial ¶10:17 and cases cited therein.

Second cause of action -- harassment. To establish unlawful harassment that is actionable under FEHA, a plaintiff must establish (1) he belongs to a protected group; (2) he was subjected to unwelcome acts or works based on his protected status; (3) the workplace was permeated with discriminatory intimidation, ridicule and insult that is so pervasive or severe it altered the conditions of employment and created an abusive working environment; and (4) respondeat superior. Fisher v. San Pedro Peninsula Hospital (1989) 214

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Cal.App.3d 590, 610. Defendant meets its initial burden of showing that plaintiff cannot establish a prima facie case of harassment because plaintiff does not identify with any admissible evidence any racially offensive conduct that was severe or pervasive. The single comment that plaintiff heard occurred outside the statute of limitations and is not severe or pervasive. (UF 41(a).) He did not inform management of any offensive conduct before March 2008; the city cannot be liable for events of which it had no advance knowledge. Plaintiff admits that there were no further incidents after his interviews with management. Plaintiff does not show that there was any racially offensive conduct that was severe or pervasive. Although plaintiff's evidence is inadmissible, the court notes that plaintiff's witness statements purport to show the existence of derogatory racial epithets and other evidence of a hostile working environment of which plaintiff Childs has no personal knowledge. Such evidence cannot raise a triable issue in a hostile work environment claim. Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 610; Beyda v. City of Los Angeles (1998) 65 Cal.App.4th 511 ("a reasonable person would not perceive a work environment to be objectively hostile or abusive based on conduct toward others of which she is unaware.")

Third cause of action -- retaliation. To state a prima facie case of FEHA retaliation, a plaintiff

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must show that (1) he engaged in "protected activity" by complaining to the employer of discrimination or participating in activities opposing the employer's practices reasonably believed to be unlawful under §12940, (2) the decision maker took an adverse employment action against plaintiff, and (3) the action would not have been taken but for the complaint. Mokler v. County of Orange (2007) 157 Cal.App.4th 121, 138. Childs cannot establish a prima facie case of retaliation under FEHA for the following reasons: First, he admits that before speaking to Moisa, Bent, and Misquez, he never complained of harassment or discrimination. An employer cannot retaliate before the plaintiff engages in protected activity. Reeves v. Safeway (2004) 121 Cal.App.4th 95, 107. Moreover, plaintiff admits that after he spoke to Moisa, Bent, and Misquez about what he viewed as improper actions in the department, there was no retaliation. (UF 54, 55.) Finally, plaintiff admits that after speaking to Moisa, Bent, and Misquez, Childs received the special assignment he requested, as well as positive performance evaluations. Accordingly, defendant has met its initial burden of showing no triable issue of material fact as to whether defendant engaged in any retaliatory conduct with respect to Childs. Because defendant's evidentiary objections are sustained, plaintiff is unable to raise a triable issue of material fact as to whether plaintiff suffered any retaliation.

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## NATURE OF PROCEEDINGS:

Fifth cause of action -- failure to prevent discrimination, harassment, and retaliation. Because actionable harassment or discrimination is a necessary prerequisite to a failure to prevent claim, Trujillo v. North County Transit District (1998) 63 Cal.App.4th 280, and because defendant has demonstrated that no triable issue of material fact exists with respect to those claims, the fifth cause of action fails.

Sixth cause of action -- violation of the Public Safety Officers Procedural Bill of Rights (POBRA). Plaintiff's admissions that he experienced no retaliation after his meetings with Moisa, Bent, and Miquez defeats his POBRA retaliation claim. (UF 90-92.) As to plaintiff's POBRA claim that the defendant did not follow standard investigatory procedures, plaintiff admitted that he has been the subject of many internal affairs investigations, that the investigations were initiated by citizen complaints against him, that only once were any such investigations -- initiated in 2005 -- sustained against him, and that he accepted the written reprimand for that violation without challenge because he felt the department was correct in reprimanding him and he did not feel the outcome was discriminatory. (UF 16, 85-91.) Because defendant's evidentiary objections are sustained, plaintiff is unable to raise a triable issue of material fact as to whether defendant

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Counsel	India S. Thompson ✓
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Defendant	Linda Miller Savitt ✓
Counsel	Christine T. Hoefner ✓
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violated POBRA.

Plaintiff's attempt to introduce a new theory in his POBRA claim that was not alleged in the complaint must be rejected. The new theory cannot defeat the motion. Weil & Brown, supra, ¶10:17.

Seventh cause of action -- injunction. Plaintiff's request for injunctive relief is premised on his meritless claims of FEHA and POBRA violations. Accordingly, the claim for injunctive relief has no merit.

Affirmative Defense: Statute of limitations. FEHA claims have a one year statute of limitations for filing the prerequisite DFEH complaint. Cal. Gov't Code §12960(d). Childs did not file a DFEH complaint until May 27, 2009. (FAC ¶72, Exh. I.) Therefore, he cannot base his FEHA claims on any events that occurred outside this limitations period, i.e., before May 27, 2008. However, plaintiff admits no events occurred after March 22, 2008. (UF 45, 93-96.) Accordingly, Childs has no evidence of wrongful conduct occurring after May 27, 2008 and his FEHA claims are time-barred. The continuing violation theory does not save plaintiff's claims. Plaintiff admits that no similar conduct that might be sufficient to raise a triable issue of material fact occurred within one year of the filing of his FEHA claim. (UF 44-45.) Accordingly, he is not entitled to application of



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## NATURE OF PROCEEDINGS:

the continuing violation doctrine. Richards v. CH2M Hill, Inc. (2001) 26 Cal.4th 798, 812, 823.

Affirmative Defense: POBRA claim is time barred by the government claim statute. Childs was required to present a timely government claim asserting a POBRA violation prior to bringing suit under POBRA. He had six months after any purported wrongful act to present a claim asserting his POBRA theory. Plaintiff identified no POBRA claim in his government claim. The claim sets forth only FEHA-based claims. Even if the government claim could be construed as a POBRA claim, plaintiff's claim is untimely. Plaintiff did not present a government claim until May 12, 2009, which restricts his POBRA claim to events occurring after November 12, 2008. He has no facts showing any violation of POBRA after November 12, 2008. He admits the only reprimand he received was in 2006 -- outside the limitations period for a government claim. He also admits he experienced no retaliation after his March 22, 2008 interview with Moisa. Thus, he has no facts showing wrongdoing within six months, or even one year, of his government claim to support a POBRA theory. Because defendant's evidentiary objections are sustained, plaintiff is unable to raise a triable issue of material fact as to whether plaintiff timely filed a government claim asserting a POBRA violation.

Motion of Defendant City of Burbank for Separate

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## NATURE OF PROCEEDINGS:

Trials

The motion is granted.

"The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action . . . or of any separate issue or of any number of causes of action or issues . . . ." Code Civ. Proc. §1048(b). A joint trial of multiple plaintiffs' factually-divergent claims creates a significant risk of unfair prejudice to defendants because evidence relating to different plaintiffs is likely to confuse the jury and evidence favorable to one plaintiff is likely to bias the jury against the defendant with respect to another plaintiff's claims. See Bailey v. Northern Trust Co. (N.D. Ill. 2000) 196 F.R.D. 513, 517-18 (where employment actions complained of were made by different section managers and team leaders at different times over a period of at least fifteen months, it would be "extremely prejudicial to the defendant if the claims of the plaintiffs are tried jointly"). (In the absence of controlling California decisions, the court may rely on interpretations of the Federal Rules of Civil Procedure and applicable federal case law for guidance. *Mixon v. Fair Employment & Housing Commission* (1987) 192 Cal. App.3d 1306, 1316-1317.) Here, the five plaintiffs allege different grounds for discrimination. The

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allegedly discriminatory employment decisions are also entirely different, as are the decisionmakers who made those decisions and the non-pretextual reasons defendant intends to present for making those decisions. The employment decisions argued to be discriminatory also vary widely. While each plaintiff alleges that he/she was retaliated against, the actions on which the alleged retaliation was based was different for each plaintiff, and the form of alleged retaliation was different in each case. While each of the plaintiffs claims to have been harassed, the alleged harassment consisted of conduct by different people at widely different times and places. On these facts, four separate trials are warranted to avoid jury confusion and undue prejudice to defendant. Evid. Code § 352. The court notes that, while four trials will certainly be time-consuming, they will better serve the interests of judicial economy "than one long, combined trial in which the court must constantly caution the jury to not consider evidence that is irrelevant or inadmissible against a particular defendant." Cestone v. General Cigar Holdings, Inc. 2002 U.S. Dist. LEXIS 4504 (S.D.N.Y. Mar. 18, 2002).

The motion is not premature. Trial is only four months away. It is not too soon to let the parties know how the trials will proceed.

A trial setting conference is set for April 16,

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**NATURE OF PROCEEDINGS:**

2010, at 9:00 a.m. in this department.

Notice is waived.